FILED
FEB 25 1901
JAMES H. McKENNEY,
Clerk.

No. 214.

Br. of Cunneen for Appts.

Filed Feb. 25, 1901

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APPELLANTS' BRIEF.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1900.

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THE TOWN OF TONAWANDA AND ANOTHER, *Appellants*,

vs.

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vs.

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Appeal from the Circuit Court of the United States for the Northern District of New York.

Statement.

This suit was brought to have a local assessment made by the Town Board of the Town of Tonawanda, Erie County, State of New York, adjudged void, and for a perpetual injunction against the enforcement of the same. The relief is claimed upon the allegations of the bill that the amount assessed is the expense of improving a highway in said town connecting the City of Buffalo and the Village of Tonawanda, and expenses incident thereto. (*Fols.* 5-6 of Record). That the plaintiff is the owner of two parcels of land fronting on said highway so improved and included in said assessment. (*Fol.* 4).

That said improvement was made under a statute passed by the Legislature of the State of New York in 1893, and distinguished by Chapter 550 of the laws of that year, which statute authorized the Town Board to borrow the moneys necessary, to issue bonds of the Town for the same with interest, and to assess the amount necessary to pay said bonds and interest upon the lands fronting or bounding upon that part of the highway improved; that an assessment roll of said expense was made pursuant to this statute. (*Fols.* 5-6). That said Legislature enacted another statute in 1895, which is distinguished by Chapter 816 of the Laws of that year, and which authorized and empowered the Town Board to again assess said expense and to make a new assessment roll it is alleged "in the manner provided "by said statute for making local assessments for raising the ex-"penses of grading and paving of streets, and pursuant to the "rules of apportionment and division of the expense therein pro-"vided." (*Fol.* 9). And that as it is alleged "said Act also pro-"vided and enacted that the expense of local improvements for "paving or macadamizing any highway should be assessed upon "the lands fronting or bounding on both sides of the part of the "highway upon which the improvement was made, and that so "much of the expenses of the improvement should be raised from "each separate lot or parcel of land as shall be in the same pro-"portion to the entire expense locally assessed as the number of "feet for which the lot shall bound or front upon that part of the "street in which the improvement shall have been made shall be "to the aggregate number of feet of frontage or bounds to be sub-"jected to the entire assessment." (*Fols.* 9 and 10).

That as it is alleged the Town Board after the Act of 1895 was passed "by virtue of the provisions of said Act, adopted "and filed an assessment roll" * * * "to raise the "amount of such assessment for said improvement, and that "in and by said assessment, so much of the entire expense of the "improvement of grading and paving said Delaware street and

"highway, including interest on moneys borrowed by the issue "and sale of said bonds hereinbefore described, and the expense "pertaining to the making of said improvement, or the money "borrowed for that purpose, by said Town, which remained un- "paid, was assessed on each of said lots and parcels of land in the "same proportion to the entire expense locally assessed as the "number of feet for which said lot or parcel of land bounded and "fronted upon that part of the street in which the said improve- "ment had been made, was to the aggregate number of feet of "frontage or bounds subjected to the entire assessment, which "said assessment upon Parcel No. 59, now owned by your "orator, was $5,207.16, and on Parcel No. 62, was "$5,206.26."

It is further alleged "that all the lands assessed for said im- "provement of grading and paving said Delaware Street, such "highway, hereinbefore set forth, were not and are not benefitted "equally by the making of said improvement of grading and "paving said street; that many of said lots and parcels are un- "equal in size and depth and of unequal value." (*Fol.* 13).

It is also shown by the bill that under the statutes referred to the amount of the assessment is a lien upon the plaintiff's property, that no payments have been made on the assessments, and that the complainant apprehends that the defendants are about to proceed to sell his lands in satisfaction of the assessment liens.

There is no allegation in the bill that any injustice or wrong to the complainant has resulted from the methods of apportionment adopted, or that the complainant is compelled to pay more of the expense of the improvement than is equal to the value of the benefits conferred upon his land by the improvement. It cannot be claimed that such is inferable from that the lots "are not benefitted equally by the making of said improvement" and of unequal size, depth and value, because the ~~value~~ and size affected the value and the amount apportioned depended on the size. Besides a claim for relief should not be made upon inferances. It should be sustained by verified facts. The claim for relief rests solely and exclusively upon the claim that an erroneous or unlawful method of apportionment, was used by the Town Board. There are allegations, conclusions of law, that if the Court will not grant the relief desired, "the lands and property of your "orator hereinbefore mentioned, will be taken for public use with- "out just compensation, and your orator will be deprived of his "said lands and property without due process of law, contrary "to the provisions of the Constitution of the United States."

But the only facts alleged from which it is attempted to draw these conclusions, are those to which the attention of the Court has hereinbefore been invited.

The defendants filed a demurrer and plea to this bill. (*See fols.* 27-40 of Record). The demurrer and plea were over-ruled, and thereupon the defendants answered. They admitted that

the improvement had been made; that the indebtedness had been incurred; that the bonds had issued; that over $200,000 of the indebtedness remained unpaid; that a large part thereof had become due, and that the Supervisor of the Town was taking proceedings for the sale of the plaintiff's lands; they admitted that the assessment and re-assessment had been made; they admitted that each of the assessments had been made by apportioning to each parcel of land so much of the amount assessed as bore the same relation to the entire amount that the frontage of the parcel upon the street bore to the entire frontage upon that part of the street improved.

But they denied "that said method was an arbitrary manner "or method of assessing the same, because in following said "method, as aforesaid, they obeyed the mandate of said statute, "and on that behalf they allege and aver upon their information "and belief that that rule of apportionment was adopted and au- "thorized by the Legislature of the State of New York with refer- "ence to, after inquiry into, and upon consideration and deter- "mination of the benefits which the improvement authorized and "made conferred upon the said lands, which inquiry, considera- "tion, and determination appears by the statutes aforesaid and "by each of them, and that the Legislature of the State of New "York, under the Constitution of that State, has frequently in- "terpreted by its highest courts, had and now has the power and "capacity to prescribe such rule for apportioning expense of local "improvement as will in its judgment best result in apportioning "to each parcel of land assessed that part of the expense which "shall be in proportion to the benefit conferred by the improve- "ment."

They denied "that under the terms and conditions and the "rule and basis of levying said assessment it was impossible for "the boards and officers making said assessments to levy and ap- "portion said assessments in proportion to the benefits received "by each parcel of land assessed to pay for said improvement of "grading and paving said street, and beg leave to submit the "said statute and every part thereof to this Honorable Court "upon the hearing of this case, that proper construction thereof "may be given by the Court."

They "further allege and aver that said determination made "by the Legislature and evidenced by the said statutes and by "each of them bars and precludes the complainant from asserting "or claiming that said assessment is not made upon the com- "plainant's lands in proportion to the benefits which they derived "by the making of said improvement; and they crave leave to "submit the said statutes and each and every part of them to "this Honorable Court, that the same may be properly construed "in that regard." (*Fol.* 47).

The defendants then reiterated the first, second and third paragraphs of their pleas adopting and making them a part of their answer, which paragraphs are as follows, to-wit:

First:—They deny that it was impossible for the Boards and Officers making said assessment to levy and apportion said assessment in proportion to the benefits received by each parcel of land assessed to pay for said improvement of grading and paving said street, and allege that the provisions of the statute aforesaid in that regard only required that the said Boards and Officers should assess the expense of said improvement upon the lots fronting or bounding on both sides of that part of the highway on which the improvement was made, and that the said Boards and Officers were free to and that it was their duty under the provisions of said statute to assess said expense upon said several lots or parcels of land in proportion to the benefit which each of them derived by the making of said improvement.

Second:—And further plead that after the enactment of chapter 550 of the Laws of the State of New York of 1893 in the bill referred to, and on or about the 3d day of July, 1893, the Columbia Land Company, a corporation organized under and pursuant to the Laws of the State of New York, was the owner in fee of the lands and premises described in the bill of complaint and now belonging to the complainant, whose title is derived as follows, viz:

On October 5, 1891, the legal title to the lands on Delaware street described in the complaint was conveyed by one Wire and others to William F. Sheehan in trust for himself and for the plaintiff Lyon and one Defreest, and on said day said Sheehan executed and delivered to his grantors to secure the payment of part of the purchase price of said lands three mortgages thereon, which were duly recorded on or about said day in the office of the County Clerk of Erie County, N. Y.; that thereafter and on December 29, 1892, said Sheehan sold and conveyed said lands to one Hulbert, taking back from said Hulbert a mortgage for part of the purchase price, which was also duly recorded in said clerk's office at or about the time the same bore date, which said mortgage was held by said Sheehan until September 17, 1897; that on January 24, 1893, said Hulbert sold and conveyed said lands to the Columbia Land Company; that thereafter and on or about the 7th day of September, 1897, in an action in the Supreme Court, Erie County, in which the owners and holders of the three purchase-money mortgages executed and delivered by said Sheehan to his grantors on October 5, 1891, as first hereinafter mentioned, were plaintiffs and said Sheehan and all other parties interested in said lands subsequent to said mortgages, including the said Columbia Land Company, were defendants, said three purchase-money mortgages were foreclosed and a judgment of foreclosure and sale entered, and on same day and by virtue of said judgment said lands were sold by referee duly appointed in

said action of foreclosure and conveyed to said Sheehan, Defreest, and Lyon, and thereafter and before the commencement of this action the interests of said Sheehan and Defreest therein were transferred to the plaintiff Lyon, who at the time of the commencement of this action was the owner and holder of the whole legal title thereto.

That on the said 3d day of July, 1893, the said Columbia Land Company, then being the owner of said lands, as aforesaid, subject to said mortgages, filed with the Town board of the town of Tonawanda a written petition, signed by the said coporation and other owners of property fronting and bounding on that part of the Delaware street or road improved, as mentioned in the bill of complaint, wherein the said signers petitioned the said Board to order said part of said road or street to be paved forty feet in width "persuant to the provisions of Chapter 550 of the Laws of 1893, authorizing the paving of streets in the Town of Tonawanda."

That thereupon, and on said 3d day of July, 1893, the Town Board of the Town of Tonawanda, initiated the proceedings mentioned in said petition, in the form specified in said statute.

That by Section 1 of Chapter 550 of the Laws of New York of 1893, the Town Board of the Town of Tonawanda were required to give notice and a hearing to all persons interested in said improvement before determining to make the same. Reference is hereby made to said Statute for greater certainty as to its form and requirements. That the said Board upon filing said petition and adopting a resolution proposing to make said improvement did give said notice, and designated therein a time and place within said town when the Board would meet to hear all persons interested in said improvement who should appear pursuant to said notice or otherwise to make such objections as they might have to such improvement, and that the Board aforesaid met at the time and place mentioned in said notice but that neither the complainant nor any person with whom he is in privity of estate, appeared before the said Board at the time and place aforesaid or made any of the objections to the said improvement or to the said statute or to its validity which are mentioned in the bill in this suit, or any of said objections whatsoever, and that thereupon the Town Board determined to make said improvement.

That Section 4 of the Statute last mentioned provided that said determination to make said improvement should have "no force or effect until the consent in writing shall be obtained of the owners of at least one-half of the actual feet frontage of land on each side of any highway ordered as aforesaid to be improved, excepting therefrom the space occupied by highways crossing the same."

And that afterwards, and on or about the 19th day of July, 1893, the said Columbia Land Company then being the owner in fee of the lands and premises now owned by the complainant in

this action as alleged in the said bill, the said lands being then subject to said mortgagees, as aforesaid, there was filed with the Town Board of the Town of Tonawanda another writing, wherein it was recited that the Town Board had "in pursuance of Chapter 550 of the Laws of 1893 duly ascertained and determined the expense" of the improvement and "having duly met and heard all objections offered by any party interested in said improvement, and said Board having thereupon and on the 25th day of July, 1893; duly ordered and determined" to make said improvement, further continued as follows:

"Now, therefore, in pursuance of Section 4 of said Chapter 550 of the Laws of 1893, we, the undersigned, being the owners of more than one-half of the actual feet frontage on each side of said highway to be improved as aforesaid (excepting therefrom the space occupied by highways crossing the same), do hereby consent to said improvement as ordered, hereby ratifying and confirming the action of said Town Board in the regard mentioned."

Which last mentioned written instrument so filed as aforesaid with the Town Board was signed by the said corporation Columbia Land Company by its proper officers, and by numerous other persons and corporations owning lands fronting and bounding on that part of the street or highway aforesaid improved as aforesaid. And that thereupon, and on the 29th day of July, 1893, upon receiving and filing the written consent of property owners last mentioned, the Town Board of the Town of Tonawanda determined that the consent in writing of the owners of at least one-half of the actual feet frontage of the land on each side of the highway ordered as aforesaid to be improved, excepting therefrom the spaces occupied by the highways crossing the same, had been obtained, and in view thereof, resolved and determined that the improvement be made, and that bonds of the Town of Tonawanda to the amount of two hundred and thirty-two thousand, six hundred dollars be issued by said town for the purpose of obtaining money to make said improvement, and that such bonds be sold for that purpose and the moneys used in making said improvement, and that said bonds were so issued and sold and the moneys realized from the sale of said bonds were used in making said improvement petitioned for and consented to by the Columbia Land Company as aforesaid, which improvement and bonds are the same improvement and bonds mentioned in the complainant's bill in this suit.

Thereupon the Town Board of the Town of Tonawanda proceeded in the manner and form specified in said Chapter 550 of the Laws of New York of 1893 to assess the moneys necessary to pay said bonds upon the said parcels of land fronting and bounding upon that part of the said street or highway improved as aforesaid.

That pursuant to Section 6 of Chapter 550 of the Laws of 1893, the said Town Board caused the list of said lots or parcels of land, mentioned in the said bill, to be made and filed, and that thereupon the notice, prescribed by said Section 6 in said statute, was given to all persons interested, that the said Board would meet at a time and place which were specified therein, to hear all objections, which should be made to said list or assessment, and and that at the time and place specified in and by said notice the said Town Board did meet to hear and consider such objections, but that neither the said Columbia Land Company nor the complainant, nor any person in privity of estate, or either of them, appeared or made any objections to the said list. That thereupon the said list was, as alleged in the bill, affirmed and filed and a copy thereof delivered to the Supervisor of the Town of Tonawanda, William J. Rogers, who was the predecessor of the defendant Patton, as Supervisor of said town; that the said Supervisor proceeded to collect said assessments and to apply the same in payment of principal and interest as the same became due, pursuant to the provisions of said bonds, and did threaten to advertise and sell such lands, so assessed as aforesaid, as should be necessary to raise the moneys necessary to pay said bonds, and that the Supervisor of said town for the time being continued to make collections of the instalments of said assessments until on or about the 29th day of May, 1895, when Chapter 816 of the Laws of the State of New York of 1895 was approved by the Governor and became of force, and that thereupon the Town Board of the Town of Tonawanda proceeded to re-assess the moneys necessary to pay said bonds as aforesaid, pursuant to the direction contained in section 27 of the statute last mentioned.

That the said Board caused an assessment roll to be made and filed, as mentioned in the bill, and pursuant to Section 44 of the statute last mentioned the said Town Board caused notice to be published that at a time and place, which were specified therein, the Board would meet and hear and consider any objections which might be made to the said roll, and that at the time and place, which were so specified in said notice, the said Board did meet and heard and considered such objections as were made to the said assessment roll, and did consider and act on all such objections as were made to the same, and that neither the complainant in this suit, nor any person with whom he is in privity of estate, appeared before the said Board at said time and place or made any of the objections mentioned in the bill of complaint, or any objections whatsoever, to the said assessment roll, or to the said assessment.

That thereupon, and on or about the 12th day of August, 1895, the said Board affirmed the said assessment roll, and that thereupon the said assessment roll was filed and delivered for collection, being the same assessment roll mentioned and described in the bill herein.

And that thereupon the Supervisor of the Town of Tonawanda accepted the said assessment roll and assumed the collection of said assessments, and that the assessment made under pursuant to the provisions of Chapter 550 of the Laws of 1893, as aforesaid, was abandoned.

That under and pursuant to the provisions of Section 46 of Chapter 816 of the Laws of 1895, aforesaid, any person interested who shall have appeared before the Town Board and made his objections at any hearing provided for in that statute, and who shall consider himself aggrieved by the action of the Board, may within 20 days thereafter have a writ of certiorari for a review of the decision or action of the Board in the Supreme Court of the State of New York pursuant to the general procedure of that court.

And these defendants allege and show, that neither the complainant in this action, nor any person with whom he is in privity of estate, took any action whatsoever under that part of the statute last mentioned for the review of any of the said decisions of the Town Board of the Town of Tonawanda upon any ground mentioned in the bill herein, or upon any other account whatsoever.

These defendants further allege and show upon information and belief that by Article 7, Title 2, Chapter 16 of the Code of Civil Procedure of the State of New York, the Supreme Court of the State of New York has and during all the times mentioned herein has had jurisdiction and power in proceedings at law to review every order or determination of the Town Board of the Town of Tonawanda which was made under and pursuant to the provisions of either of said statutes, and these defendants allege that the complainant in this suit did not, nor did any person with whom he is in privity of estate, take any proceedings at law whatsoever under or pursuant to the said Article 7, Title 2 of Chapter 16 of the Code of Civil Procedure, to review any of the orders or determinations which were made by the Town Board of the Town of Tonawanda under or pursuant to the provisions of statutes of 1893 and 1895, or of either of them.

These defendants further show that no action at law, or suit in equity, was commenced in the State, or other courts, for the purpose of setting aside said assessment roll on any ground whatsoever, or for any other relief or judgment concerning the same until on or about the 5th day of February, 1896, when a suit was instituted by the service of a summons and complaint by Joseph T. Jones, the owner of a parcel of land included in said assessment, in the Supreme Court of the State of New York for the purpose of having said assessments adjudged illegal and void and of enjoining the enforcement of the said assessments. That no application for an injunction *pendente lite*, restraining the said Supervisor or enjoining him from collecting said assessments, was made in that suit until on or or about the 22nd day of Aug-

ust, 1896, when notice of an application for such an order was served in the said case of Joseph T. Jones against the said town; that until that motion was noticed as aforesaid no arrangement, agreement or understanding of any name or nature whatsoever was made by the said town, or by any person on its behalf, that any proceedings in reference to said assessment should be suspended until the result of the said suit, or any other suit in said Court, or any other Court, could be determined, or until the Legislature of the State of New York should make some new or further enactment in reference to said assessment, but that the said successive Supervisors of the Town of Tonawanda were endeavoring to collect said assessments, and that the defendant Patton, as such Supervisor, was about to advertise the lands, the owners of which had made default in payment of said assessments, including the lands of the plaintiff in this action, for sale to pay said assessments when said motion for said injunction *pendente lite* was noticed in said Jones case aforesaid.

That this complainant did not commence any suit in the Supreme Court of the State of New York, or elsewhere, to have said assessments declared illegal or void, or to restrain or enjoin the collection of them, or either of them, *until on or about the 8th day of March, 1899.*

That a large number of suits were commenced by owners of the property assessed as aforesaid, and persons interested therein, in the Supreme Court of the State of New York for the purpose of having said assessments adjudged void and of enjoining the enforcement thereof, but that all of said suits have been dismissed by the Supreme Court of the State of New York, most of them because the plaintiffs in each of said suits were not prepared to proceed to trial when the cases were reached and the trial thereof moved by these defendants.

These defendants further allege and show, that two installments of principal and interest, which became due and payable on said bonds in 1894 and 1895, have been paid; that certain of the owners of property assessed for the improvement as aforesaid have made all payments which have become due on their assessments; that the defendant, the Town of Tonawanda, has raised by general tax the moneys necessary to pay a part of the said two installments of 1894 and 1895, which payments were made before any suit at law or in equity was commenced to have said assessments adjudged void, or to restrain or enjoin the collection of them. That all of said bonds have been sold, and some have been re-sold, and that many of them are owned by Savings Banks, representing trust funds, and a large number of them are owned by the State of New York, and that said bonds were acquired by the State and by said banks and trust companies before any suit or litigation was instituted or commenced, adjudging or questioning in any manner the validity of said statutes or of said assessments or of said bonds.

That the complainant and his predecessor in interest and all others interested as owners, and otherwise, in the lands so assessed, have been guilty of *laches* in not making or asserting any claim that said assessments or proceedings, or the statutes under which they were taken, or the said bonds, were void or illegal, as hereinbefore more fully specified, until investments have been made and proceedings have been taken and interests have become vested as above mentioned in reliance on the validity of said statutes and proceedings, which it would be inequitable and unjust to now disturb, and which proceedings would not have been taken, which investments would not have been made and which rights would not have become vested, had not the Columbia Land Company and others filed the said petition and consent with the Town Board of the Town of Tonawanda and induced it to take the proceedings in making the improvement and the assessment, and issueing and selling the bonds aforesaid.

Third. That there are eighty-four (84) separate parcels of real estate included in said assessment roll. The owners and persons interested in most of these parcels are residents of the State of New York and within the jurisdiction of this court. The defendants are subject to separate suits by the owners and persons interested in each of said parcels. The owners of said bonds are, so far as known to these defendants, within the State of New York and the jurisdiction of this Court. The rights of the owners of these bonds must necessarily be affected by any order or decision which may be made in this suit pursuant to the prayer of the bill, as it is sought to restrain and enjoin the defendants in this action from raising the moneys necessary to pay the said bonds, principal or interest.

These defendants are also subject to suits by the different owners of these bonds for their enforcement, and the State of New York, by its Comptroller and Attorney General, has already threatened to commence proceedings, either by action at law or mandamus, to compel the payment of the interest and of that part of the principal of the bonds now owned by the State which has become due and is payable.

And these defendants allege that the complainant should not be allowed to have or maintain this suit unless the owners of all lands so assessed as aforesaid and the owners of said bonds be made parties to this suit. That all controversies concerning the subject matter of this suit be determined and adjudged.

The case was brought on for a final hearing on stipulated testimony and the affidavits, before Hon. Alfred C. Coxe, Judge, who directed the final decree pursuant to the prayer of the Bill. Thereupon the appellants filed Assignment of Errors, appearing at pages 50 to 53 of the Record, and perfected their appeal to this Court.

The new assessment roll, made under Chapter 816 of the Laws of New York of 1895, was for the same cause and upon the

same lands as the assessment made under Chapter 550 of the Laws of New York of 1893. That this was authorized by the Law of 1895 has been decided by the Court of Appeals of New York.

Jones vs. Tonawanda, 158 N. Y., 438.

Errors Assigned.

The decree is alleged to be erroneous in that it over-ruled.

1.—The claim that the plaintiff is estopped by the affirmative act of his immediate predecessor in title in petitioning for the improvement which caused the expense for which the assessment is made, and by the acquiesance of the mortgagee on the fore-closure of whose mortgage the plaintiff took title in the making of the improvement, and his failure to appear or object to the improvement at any of the hearings directed by the statutes and held by the Town Board.

2.—In over-ruling the claim that the plaintiff is precluded from the relief for which he prays because of long delay in asserting his objections to the improvements which were made in 1893; whereas, this suit was not begun until September, 1899.

3.—In over-ruling the defendants' claim that if the statute and proceedings are unconstitutional and void the invalidity appears upon the face of the proceedings constitute no cloud upon plaintiff's title and no grounds for relief in equity.

4.—In over-ruling the claim that the plaintiff has had and has now full, adequate and complete remedies at law.

5.—In over-ruling the claim that material and necessary parties to a proper and complete determination of the controversy were not before the Court.

6.—In holding that the mere fact that the assessment was levied upon each parcel according to its frontage rendered the assessment void, without any evidence as to whether this was done after a prior determination that each parcel was benefited by the improvement to the extent of the amount thus assessed. The Court thus reversing the presumption that the official acts of the Legislature and of municipal boards result from correct procedure.

7.—The Court erred in holding and deciding that the complainant by his bill makes a case which entitles him in a Court of Equity to relief against the defendants, or either of them, touching the matters contained in the said bill.

These points are taken by the demurrer, plea and answer, and in the assignment of errors filed.

POINTS OF LAW.

1.

The plaintiff is estopped from maintaining this suit by the affirmative act of his immediate predecessor in title in petitioning for the improvement which caused the expense for which the assessment is made, and by the acquiesence in the making of the improvement of the mortgagee on the foreclosure of whose mortgage the plaintiff took title, and by the plaintiff's delay in commencing this suit.

While the improvement was made under the law of 1893 and the final assessment was made under the Law of 1895, these acts were all in the same proceeding and each was designed to contribute to one result, which was the making of the improvement and paying for it. It was always believed that the improvement was of local benefit and expected that the expense should be raised by local assessment, and all that was done under either statute was in furtherance of this theory.

Therefore, in considering this point, which is addressed to the judicial discretion of the court, the entire history of the transaction should be considered that the court may see whether the plaintiff's claim may find support in equity.

I understand the practice to be such that when this case was brought on for hearing upon the pleadings, new matter in the defendants' pleadings is taken as true, and in arguing this point I refer to this matter as admitted.

Banks vs Manchester, 128 U. S., 244, (at page 251.)

When this court has learned and considered the opportunities which the plaintiff and his predecessor in title, with whom he is in privity, have had of which they have not availed themselves to redress any pretended grievance, how rights and interests have become vested in the confidence that these proceedings were valid, and how the commencement of this action was delayed, I am sure that this point will be deemed well taken.

The first three sections of Chapter 550 of the Laws of 1893, of the State of New York read as follows:

"§ 1. The town board of said town of Tonawanda is hereby authorized to meet, ascertain and determine the probable expense of grading, gravelling, macadamizing or paving any highway extending from the village of Tonawanda to the city of Buffalo with stone or other material. The cost of plans, estimates, assessments, surveys, publications, and all expenses incidental to the making of any such improvement shall be considered as a part of the expense thereof. The said board, after the making of any determination as aforesaid, shall cause an order to be entered in the minutes of the said board, reciting in general terms the improvement proposed, with the materials to be used, and the estimated expense thereof, together with the highways upon which it is proposed to make such improvement, as well as any

other matter which said board may deem necessary and material. A copy of said order shall be published once a week for two weeks in a newspaper printed in the village of Tonawanda. Said order shall also contain a notice notifying all persons interested in said improvement to appear before said board at a time and place to be specified therein, which shall not be less than ten days after the first publication thereof, to make such objections as they may have to such improvement, which order and notice, in addition to being published as aforesaid, shall be posted conspicuously in at least three public places in said town, not less than ten days prior to the date to be specified therein for the hearing of objections as aforesaid. The said order and notice shall be signed by the chairman of the town board of said town.

"§ 2. At the time and place to be specified in the notice mentioned in the last preceding section, or at such time and place as the said town board shall adjourn to from time to time, it shall give all persons appearing to object to said improvement, or to be heard in reference thereto, a reasonable hearing, and thereupon may reverse, affirm or modify the said order as the said board may deem proper.

"§ 3. After such hearing, if the said town board shall determine that it is necessary and proper to improve any highway, or any part of any highway, leading from the village of Tonawanda to the city of Buffalo as aforesaid, by grading, gravelling, macadamizing or paving the same, it shall thereupon make an order or determination to that effect, which shall also be extended in the minutes of the said board, which order shall also contain the particular highway or highways, or parts thereof, to be improved, the material to be used, and, so far as may be, the time and manner in which said improvement is to be made; and also a provision that all such improvements are to be done by contract, to be let after due notice thereof to the lowest responsible bidder."

It is undisputed in this case that on or about the 3d day of July, 1893, The Columbia Land Company, the then owner of the lands described in the bill of complaint, filed with the town board a written petition, signed by itself and others, wherein the signers petitioned the said board to order that part of said highway or street mentioned in the complaint "to be paved forty feet in width "pursuant to the provisions of chapter 550 of the Laws of 1893 "authorizing the paving of streets in the town of Tonawanda," and "that thereupon, and on said 3d day of July, 1893, the town "board of the town of Tonawanda initiated the proceedings "mentioned in said petition."

(Plea folio 31 and 32; answer folio 47).

It is also undisputed that the notice required in section 1 of the act, and the hearing mentioned in section 2 of the act, were had; and that all persons who had any objections to the making of the improvement were heard, and their objections were considered, and that after the notice and hearing and deliberation the

board made an order in the form prescribed by section 3 of the act, which described the improvement made as mentioned in the bill.

Section 4 of chapter 550, Laws of 1893, provided as follows:

"When any such improvement shall have been determined "upon and ordered as aforesaid, the same shall have no force or "effect until the consent in writing shall be obtained of the owners "of at least one-half of the actual feet frontage of land on each "side of any highway ordered as aforesaid to be improved, ex- "cepting therefrom the space occupied by highways crossing the "same."

It is also admitted that on or about the 19th day of July, 1893, The Columbia Land Company, then being the owner of the plaintiff's lands, filed with the town board another writing intended to satisfy the provisions of section 4, aforesaid, wherein it was recited that the town board had "in pursuance of chapter "550 of the Laws of 1893 duly ascertained and determined the "expense" of the improvement, and "having duly met and heard "all objections offered by any party interested in said improve- "ment, and said board having thereupon and on the 25th day of "July, 1893, duly ordered and determined" to make said improvement, further continued as follows:

"Now, therefor, in pursuance of section 4 of said chapter 550 "of the Laws of 1893, we, the undersigned, being the owners, of "more than one-half the actual feet frontage on each side of said "highway to be improved as aforesaid (excepting therefrom the "space occupied by highways crossing the same), do hereby con- "sent to said improvement as ordered, hereby ratifying and "confirming the action of said town board in the regard "mentioned." (Plea folio 33; answer folio 47).

Section 5 of chapter 550, aforesaid, provided.

"When any such improvement shall have been ordered "as aforesaid, and the consent of the property-owners shall have "been duly obtained, in the manner and form aforesaid, the town "board is hereby authorized and empowered to cause to be issued "bonds of the said town for the providing of funds for the pay- "ment of the expenses thereof or any part thereof, and thereby to "pledge the faith and credit of said town to the extent and "amount of such bond or bonds, the same to bear interest at a "rate not to exceed six per centum per annum, and to be for such "amounts and upon such terms and conditions as may be deter- "mined by the said board."

And it is admitted that the town board, on receiving the said written consent, and on due deliberation, determined that the consent in writing of the number of property-owners required by section 4 of chapter 550, aforesaid, had been given, that the improvement should be made, and issued bonds to the amount of two hundred thirty two thousand six hundred dollars ($232,600), which were sold, and which have passed into the hands of holders

in good faith, excepting only such notice as may be imputed to them of the invalidity of the law, if it was invalid, and that the street between the city of Buffalo and the village of Tonawanda, in the town of Tonawanda, was graded, curbed, paved and drained at the expense mentioned in the bill and plea of over three hundred thousand dollars ($300,000).

The road has been in general use continuously since 1892. (*Fols.* 5-8 of Bill, and Plea, *fols.* 34-35; Answer, *fol.* 47).

Section 6 of Chapter 550 of the Laws of 1893 provided:

§6. "When the town board shall have duly affirmed the order proposing any such improvement, and finally determined upon the same, and after the execution and sale of said bonds for the purpose of providing for the payment and expense of said improvement in the manner aforesaid, then for the purpose of providing for the payment and discharge of said bonded indebtedness, they shall cause a list of all the several lots or parcels of land to be subjected thereupon, and bounding on any highway to be improved, to be made which shall describe each parcel or lot thereof, so that it can easily be identified and distinguished, and specifying the number of lineal feet of its frontage or boundary on that part of the highway to be improved. Such list shall be filed with the town clerk who shall thereupon give public notice of the completion and filing thereof by publication of such notice at least once in a newspaper published in said village, if one be published therein, and by posting only if no newspaper be published therein, and said notice shall contain a provision that any objections to the accuracy or form of such list may be made to the town board at their next meeting therein stated to be held not less than ten nor more than twenty days after said notice shall be first published and posted as aforesaid. If such notice be given, and no objections are made, the said list shall become and be final and conclusive by the acquiescence of the parties concerned. All objections which shall be made pursuant to such notice, the said board shall consider and determine upon, and may affirm or reverse said list, or amend the same, or correct any error therein, or annul the same and proceed anew, and when the said Board shall have affirmed a list it shall become final and conclusive upon all parties concerned."

And it is conceded that the notice and hearing provided for in that part of Section 6, above quoted, were given and had. (Plea, *fol.* 35; Answer, *fol.* 47).

It is also admitted that the assessment-roll was completed, delivered to the supervisor for collection, and that the supervisor of the town continued to collect installments as they became due until the 29th day of May, 1895, when Chapter 816 of the laws of that year became of force by the Governor's approval. (Plea, *fol.* 35; Answer, *fol.* 47).

Section 27, Chapter 816, Laws of 1895, provided as follows:

"Where any highway or part of highway within any such

"town has been paved or otherwise permanently improved under "any law providing for the assessment of the expense of such im- "provement locally, such highway shall be subject to the control "and management of said board, and where any part of the ex- "pense of making such improvement, including interest on "moneys borrowed, and all other incidental expenses in anywise "appertaining to the making of the improvement, or money bor- "rowed for that purpose by the town, shall remain unpaid at the "time that this act goes into effect, for the purpose of defray- "ing such expenses and of repaying the moneys borrowed, said "board is hereby authorized and empowered, and it shall be its "duty to cause to be assessed the entire expense of the improve- "ment aforesaid upon the several lots or parcels of land fronting "or bounding upon that part of the highway so improved as "aforesaid, and in the manner provided by this statute for mak- "ing local assessments for raising the expenses of grading and "paving of streets; and pursuant to the rules of apportionment "and division of the expense herein provided. And all such pro- "ceedings shall be had for reviewing, confirming, correcting or "annulling such assessment as are provided by this statute in "cases of assessment for like improvement made under its provis- "ions, and any assessment which may be made under the "provisions of this section, for all purposes of making, re- "viewing, confirming, correcting or annulling the same, "shall be regarded as if said improvement was made under "and by virtue of the provisions of this act; except that where "bonds of the town have been issued and sold to obtain money "for the purpose of making said improvement, said assessments "shall be so made by said board as to become due and collectible "at the times and in the amounts necessary for the payment of "said bonds as they shall become payable, principal and interest."

The Court of Appeals of the State of New York has held that said section 27 applied to the assessment which had been previously made for the improvement of the Delaware road or street under the act of 1893, as aforesaid.

See Jones v. Town of Tonawanda, 158 N. Y. 438, 665.

It is admitted that upon chapter 816 of the Laws of 1895 becoming of force, as aforesaid, the town board proceeded to re-assess the expense of the improvement of the Delaware road, and caused an assessment-roll to be made and filed, which was filed pursuant to section 44 of the statute. (Plea folio 36; answer folio 47.)

Section 44 reads as follows:

"The engineer and surveyor shall file the assessment-roll, "when complete, with the town clerk, and thereupon it shall be "the duty of the board to cause notice to be published in the "official paper that the said assessment-roll has been completed, "and that at a time and place to be specified therein, the board "will meet and hear and consider any objections which may be

"made to the said roll. Said notice shall be published in the "official paper. The first publication thereof shall not be less "than ten nor more than twenty days before the time to be speci- "fied therein for the hearing. At the time and place to be so "specified, the board shall meet and hear and consider any "objections to the assessment-roll, and may change or amend the "same if they deem it necessary or just to do so, and may affirm "and adopt the same as originally proposed or as amended or "changed, or they may annul the same and order the engineer "and surveyor to proceed anew and prepare another list; in "which case, when completed and filed, they shall proceed to give "notice and hear and consider objections as in the first instance, "and shall possess the same powers as in the first instance to "review, correct, amend and affirm the roll."

It is admitted that the notice and hearing, which this section provides for, were given and had, and that neither the complainant nor any person with whom he is in privity of estate appeared before the board or made any objections to the assessment or the assessment-roll. (Plea folio 36; answer folio 47).

Section 46 of the statute reads as follows:

"Any person interested who shall have appeared before the board and made his objections at any hearing provided for in this statute, and who shall consider himself aggrieved by the action of the board, may, within twenty days thereafter, have a writ of certiorari for a review of the decision or action of the board from the supreme court, pursuant to the general procedure in that court. The court may review the action of the board, and if it decides that any injustice or error has been committed, may annul the proceedings and direct the board to proceed in the matter *de novo*, or may specify the correction which should be made and compel such correction by the board; and the court may, in its discretion, upon or after granting the writ, stay the proceedings of the board upon motion of the petitioner and upon such security or conditions and notice to the board as may seem proper until the final decision on the petition."

It is admitted that the complainant, nor his predecessor in title, did not avail themselves of any of the remedies afforded by these statutes for the review or revision or abandonment of the proceedings of which they now complain. By their acquiescence of others, similarly situated, the town board, the purchasers of the bonds, and the other taxpayers of the town, were led to believe that the property-owners, including the complainant's predecessor in title, were desirous of having the improvement made and were willing to meet the obligations which it imposed; and on the 12th day of August, 1895, the new assessment-roll was affirmed by the town board of the town of Tonawanda. (Plea folios 36-37 and answer folio 47.) And that thereupon the supervisor of the town proceeded to collect this assessment-roll and continued without interruption until on or about the 22d day of

August, 1896, when an attempt was made in a suit which had then been pending six months, to obtain an injunction restraining the supervisor from selling some of these lands. (Plea folio 37-38; answer folio 47.)

This was three years after the improvement was made and the bonds sold and the first assessment-roll made, and over a year after the second assessment-roll had been made. The complainant commenced no suit in any court to have the validity of these proceedings brought in question until the 8th day of March, 1899 (Plea folio 38; answer folio 47); nearly six years after the improvement and the original assessment had been made.

In the meantime the bonds had been sold and resold and passed into the hands of trustees and public officers. The town had made two payments on the bonds but raised some of the moneys necessary by general tax upon the property in the town. (See Plea folios 38-39; answer folio 47).

Although the plaintiff, and those similarly situated in reference to this improvement, commenced a large number of suits (folio 38 of Plea), it is alleged in the bill, and admitted, that "in "none of said actions in the State courts was the allegation made "or litigated that the statutes of 1893 and 1895 were unconsti-"tutional and void under the provisions of the Constitution of "the United States."

And these questions were first presented by the bill in this suit, which was verified the 8th day of September, 1899, over six years after the improvement and the original assessment were made, and over three years after the reassessment of 1895.

The proceedings, it will be observed, were open, notorious and were given great publicity, so that they were known to The Columbia Land Company and to the complainant from the day of their inception.

In view of this knowledge and of the long delay and the numerous opportunities for redress, should the complainant be granted relief which will result in rendering invalid the bonds, which, with principal and interest, amount to over $400,000, and assessments in a corresponding amount, or which if it be adjudged that the bonds are valid and the assessments void, will result in a burdensome tax upon property holders in the town of Tonawanda, and which in many obvious ways will disappoint the expectations and unsettle the arrangements of a very large number of people.

Pierce v. Somerset Ry. Co., 171 U. S. 641.
Evers v. Watson, 156 U. S. 521.
White v. Miller, 158 U. S. 128.
Johnson v. Atlantic, G. & W. I. Transit Co., 156 U. S. 618.

One "having notice, and failing to object and arrest the "improvement until the benefit has accrued, will be deemed to "have ratified the proceedings as fully as does one who receives the

"proceeds of a judgment or sale, with knowledge of inherent "infirmities which render it voidable, or even void."

Crawfordsville Music Hall Assn. v. Clement (App. Ct. of Ind.), 38 N. E. Rep. 228.

"When such owner knew, while the improvement was in "progress, that the street grade was to be raised, and knew of "the assesment shortly after it was made, yet waited for nearly "two years before applying for his writ, it is such delay as, under "the circumstance should lead to a dismissal of the writ."

Sup. Ct. of N. J., Stewart vs. Mayor, etc., 31 Atl. Rep., 278.

In a similar case to ours, the Supreme Court of Iowa said:

"The claim is now made that some basis of apportionment, "as according to the frontage of the lots assessed on the improv- "ment made, should have been adopted in advance of the reas- "sessment. Whether the objection is well founded, we do not de- "termine. As based upon the facts of this case, it is, at most, "purely technical. If it had any merit, it should have been made "pending the reassessment, when opportunity for the correction "of errors was offered, and will not be given weight now."

Tuttle v. Polk, 60 N. W. Rep. 738.

All the objections to the proceedings present questions of law only. The objections were as obvious six years ago as when this suit was commenced.

Of a case somewhat similar to this, Judge Danforth, writing the opinion of the Court of Appeals, of N. Y., said:

"It is obvious that these objections existed, if at all, at the out- "set of the proceedings, and when Collins as a property-owner was "before the court they might have been presented in opposition to "the application and motion which resulted in the order of Decem- "ber 13th. If they had any merit and he intended to rely upon them, "it was his clear right and duty to bring them forward at the "first opportunity. But he was not bound to mention them at "all." * * * "It is very well settled that a party may waive "a statutory and even a constitutional provision made for his "benefit, and that having once done so he cannot aftewards ask "for its protection. (Lee v. Tillotson, 24 Wend. 337; Embury "v. Conner, 3 N. Y. 511; Cooley's Const. Lim. 181.) The appel- "ant is in this position. He participated as an actor in procuring "the order which he now seeks to set aside, and took his chance "for a satisfactory valuation of his property for the purpose con- "templated by the act. To that end there was not only acquies- "cence on his part, but intelligent and efficient dealing with the "matter and consent to the order. By this consent he must be "deemed to have made his election and should be held to it."

Matter of Application of Cooper, 93 N. Y. 511, 512.

"A party may waive a rule of law, or a statute, or even a "constitutional provision, enacted for his benefit or protection, "where it is exclusively a matter of private right, and no consid-

"erations of public morals are involved, and having once done so "he cannot subsequently invoke its protection."

Mayor, etc., of New York v. M. R. Co., 143 N. Y. 26.

"But a party may waive a rule of law or a statute, or even a "constitutional provision enacted for his benefit or protection, "where it is exclusively a matter of private right, and no consid- "erations of public policy or morals are in involved, and having "once done so he cannot subsequently invoke its protection."

Sentenis v. Ladew, 140 N. Y. 466. See also Vose v. Cockcroft, 44 N. Y. 415.

These cases cited clearly establish that even the acquiescence of the parties with knowledge that the proceedings were being made for so long a period of time, would be sufficient waiver of any of the objections which this complainant now seeks to interpose. But the affirmative action of those, with whom the complainant is in privity, in filing the written petition and consent, which lead the Town Board to take the action now complained of clearly manifested such election and acquiescence that the proceedings be taken as would preclude the complainant from the relief which he seeks even if his suit had been brought sooner.

"The plaintiff was one of the petitioners for the improvement. "The only power the city had in the premises was to do the "work at the cost of the abutting owners, to be apportioned "among them according to frontage. He necessarily asked that "the work be done under that statutory rule, and thereby waived "any question as to its constitutionality. A party may waive the "benefit of a constitutional provision in his favor. (Vose vs. "Cockcroft, 44 N. Y., 415)."

Conde vs. City of Schenectady, 164 N. Y., p. 263.

"It is well settled as a general proposition, subject to certain "exceptions not necessary to be here noted, that where a party "has availed himself for his benefit of an unconstitutional law, "he cannot, in a subsequent litigation with others not in that "position, aver its unconstitutionality as a defense, although "such unconstitutionality may have been pronounced by a com- "petent judicial tribunal in another suit. In such cases the prin- "ciple of estoppel applies with full force and conclusive effect."

Daniels vs. Tearney, 102 U. S. 421.

Numerous cases are cited, after which the court continues:

"In the case first cited, an injunction was applied for to pre- "vent the collection of a tax authorized by an act of the legisla- "ture passed during the late civil war, to enable the people of a "county to raise volunteers and thus avoid a draft for soldiers, "and that object had been accomplished. In disposing of the case "the court well asked, 'Upon what principle of exalted equity "'shall a man be permitted to receive a valuable consideration "'through a statute, procured by his own consent or subsequently "'sanctioned by him, or from which he derived an interest and

"consideration, and then keep the consideration, and repudiate "the statute?'"

Here The Columbia Land Company sanctioned the statute by its petition and written consent filed to obtain a benefit and consideration in the improvement of its property. The mortgagee acquiesced in it and allowed his security to be improved. Now their successor in title, with them in privity, comes into this court *in equity*, asking to be allowed to keep the improvement and the benefit, which resulted from the petition and consent, but to repudiate the burden which it involved. It seems as if it would be unnecessary to proceed further in the consideration of this case.

As between vendor and purchaser, "a principle of common "justice forbids that one shall be permitted to lead another to act "upon a contract of purchase with him, and incur expenses by "reason of it, and then, upon some pretext of a defect in a matter "of form, refuse compliance with its provisions, and thus deprive "the purchaser of the benefit of his labor and expenditures. "Courts of equity in such cases interfere and compel the vendor "to keep his engagements."

Union Pac. Ry. Co. vs. McAlpine, 129 U. S. 305.

Again, "The improvement has been completed. All the com-"munity is enjoying its advantages. All the real estate in the "borough, including that of the plaintiffs, has been enhanced in "value thereby. The borough has become obligated to pay "therefor the sum of $100,000, individuals have been assessed for "$25,000 more, and of that amount the sum of $22,000 has "been paid; of the unpaid balance, over $600 is assessed upon the "plaintiffs. They, while enjoying the advantages of the improve-"ment, without showing that the assessment against them is "unjust, call upon the court to interfere in their behalf and excuse "them from paying their just and reasonable proportion of the "cost. Is that a case which commends itself to the favorable con-"sideration of the court? Will it be a wise exercise of the discre-"tion of the court, upon the mere suspicion of an improbable "possibility, to declare this assessment void and thereby throw "this community into the confusion and embarrassment which "must surely follow?"

Ferguson vs. Borough of Stamford, 60 Conn. 445, 446.

In the lower court the plaintiff in argument, denied any privity between himself and the Columbia Land Company and claimed to be in privity only with the mortgagee. The history of his title appears in a stipulation which has been given in evidence.

By this stipulation it appears that William F. Sheehan took title to the premises in trust for himself, and the plaintiff in this action, and another, on the 5th day of October, 1891; that on that day Sheehan executed certain mortgages upon the premises to secure a part of the purchase money. That subsequently Sheehan conveyed the equity of redemption in the lands to one Hurlburt who subsequently conveyed them to the Columbia

Land Company. That subsequently the mortgages given in 1891 by Sheehan were foreclosed, and that the plaintiff, Lyon, obtained his title on the foreclosure sale, and the plaintiff contends that there is no privity between the Columbia Land Company and Lyon; that the title, which Lyon now holds to the premises, was derived under the mortgage which was superior to the estate or interest of the Columbia Land Company in the premises at the time the latter petitioned for, and consented to, the improvement in question.

The plaintiff's counsel attaches more importance to these facts than they deserve. Counsel quoted from Greanleaf on Evidence as follows:

"The term 'privity' denotes *mutual or successive relationships* to the same rights of property."

Lyon has succeeded to the rights or relations to the property of the owners of the mortgages and of the Columbia Land Company as owner of the equity of redemption at the time the improvement was made.

Lyon is in privity with both the mortgagee and the owner of the equity of redemption. Both the owners of the mortgage and the owners of the equity were effected by the assessment proceedings. The value of the property, in which both were interested, was affected by the improvement. The value of the mortgage security was increased by the improvement, and the value of the equity of redemption was increased by the improvement, and the expense of the improvement under both statutes attached to, and become a lien superior to the estate or interest of the mortgagee and the owner of the equity of redemption.

"When such list" (assessment list) "shall have become "affirmed or final as aforesaid, the amount to be raised concern-"ing which said list shall have been made, shall become a lien "superior to all other rights, title or estate therein, upon, and to "raised from the several lots or parcels of land respectively speci-"fied thereon." (Chap. 550, Laws of 1893, Sec. 6, page 1180).

"Each installment appearing upon such assessment roll shall "become a lien at and from the time that the same become pay-"able upon the parcel of real estate upon which the same shall be "assessed, prior and superior to all other claims, liens, estates or "interests therein." (Chap. 816, Laws of 1895, Sec. 45, page 1774).

All the estate or interest which Mr. Lyon now has in the premises was affected by the assessment proceedings, and the notice which the statute required to be given, and which was given, was to "all persons interested in said improvement to appear before said board at a time and place" specified to appear and "make such objections as they may have to such improvement."

(Section 1, chap. 550, Laws of 1893, also Section 44, chap. 816, Laws of 1895.)

It was not necessary for the Legislature to require either a petition or a consent; it was sufficient that a notice and a hearing were given to all persons interested to constitute a valid assessment and to bind all estates and interests in the land. The Legislature did, however, provide that before the assessment could be made the owners of the majority of the property should consent in writing.

The owner of the mortgages in this instance had notice of the statute, had the notice required by it, knew the effect of the written petition and consent of the owner of the equity of redemption, knew that the improvement was being made, knew that it was contemplated to make an assessment for the expense, and stood idly by, as did the owner of the equity of redemption, until all the rights of bondholders, taxpayers and others had become vested; suffered the improvement of their estates and interests in the land to be enhanced by the pavement without objection, and now over six years afterward, seek to repudiate the burden which that improvement entailed. They are all in the same relation to this improvement and to the proceeding guilty of *laches* which precludes their right to recover in this case.

II.

If the Statutes and Proceedings are unconstitutional and void, this invalidity appears upon the face of the Proceedings, constitute no cloud upon the plaintiff's title, and any attempt to enforce the assessment would be a trespass for which an adequate remedy at law exists, and, therefore, a bill in equity for an injunction cannot be maintained.

These objections were not interposed in the Norwood vs. Baker case.

Equity only interferes in assessment cases "where the assess-"ment on the face of the proceedings was valid, and extrinsic "evidence would be required to show its invalidity."

Dows vs. City of Chicago, 11 Wall, 111.

"A proceeding which is upon its face not only illegal but "absolutely void, does not constitute a cloud upon the title to "real estate against which a court of equity will relieve."

Wiggin vs. Mayor of N. Y., 9 Paige, 16.

If the statute is unconstitutional it cannot, as the complainant apprehends it may, create any cloud upon his title and the recitals in the deed are of no consequence whatever, since the statute, which purports to give them consequence, is void on its face. The complainant has simply to continue to possess and enjoy his property, and if any person undertakes to disturb him by virtue of anything which may be done under an absolutely void statute, his defense at law is always available and the town must respond for his damages. Under such circumstances a suit in equity will not be maintained.

"We shall examine and consider but one question, which we "deem decisive of this case, and that is whether the act authoriz- "ing the assessment was constitutional. If it was unconstitu- "tional, no valid assessment could be made under it; and the in- "validity of the assessment would always appear, and it could "constitute no such cloud upon title as to call for the interference "of a court of equity."

Stuart vs. Palmer, 74 N. Y. 187, 188.

The very latest decisions of the Court of Appeals of New York reiterates this doctrine.

Conde vs. City of Schnectady, 164 N. Y., 258.

"Where the invalidity will necessarily appear in any proceed- "ing taken to enforce title under it" (tax deed), then the jurisdic- "tion of a court of equity cannot be invoked to set it aside. "Then the owner must wait until his title is actually assailed "under the lien, and his defense will always be at hand."

Townsend vs. The Mayor, 77 N. Y., 546.
Preston vs. Smith, 26 Fed. Rep. 885.
Marsh vs. City of Brooklyn, 59 N. Y. 280.
Guest vs. City of Brooklyn, 69 N. Y. 506.

The town is perfectly solvent and capable of responding in damages for all the injury which an attempt to enforce the assessment may cause the complainant.

Schulz vs. City of Albany, 59 N. Y. Supplement 235; citing Stebbins vs. Kay, 123 N. Y. 31.
May vs. Traphagen, 139 N. Y. 478.
Bruecher vs. Village of Port Chester, 101 N. Y. 240.
See, also, Rickcords vs. City of Hammond, 67 Fed. Rep. 380.

The statute, chapter 816, Laws of 1895, section 48, center of page 1776, gives him a year in which to redeem his lands after the sale.

"During said year, any person or persons interested in said "lands so sold, may redeem the same from the sale, by paying to "the supervisor the full amount of the bid and interest at the rate "of one per centum per month, to be computed from the day of "sale to ten days after the day that the property is so redeemed."

III.

The Assessment is Valid

The Court erred in holding and deciding that the complainant by his bill makes a case which entitles him in a Court of Equity to relief against the defendants, or either of them, touching the matters contained in the said bill.

I respectfully submit that:

1.—Local assessments are made in the exercise of the powers of taxation vested in the legislative department of the government. Everything necessary to this end is included in its power and jurisdiction; the power to determine if the improvement is necessary;

whether it is of a general or a local benefit; if local, what property is within the local territory benefited and what part of the benefit each parcel of this territory would derive.

2.—These are all questions of fact involving the exercise of judgment and discretion by the legislature. The only limitations and restrictions being those prescribed in the constitution of the United States and the State of New York. The Legislature, if it chooses, may delegate a part of this power to the appropriate local officials, but the legislature may itself conduct the entire proceeding.

3.—The power of the courts is limited to ascertaining if the legislature complies with the constitution and if the local bodies in exercising the powers delegated to them, keep within the constitution and the law by which the legislature gives the matter to them.

4.—When the legislature has kept within the constitution, and the local body has kept within the constitution and the statute, the court will not interfere by suit in equity merely because it may appear that either the legislature or the local body has used bad judgment in the decision of a question of fact, or in the exercise of its discretion. The courts recognize that any scheme dependent on human agencies for its execution may necessarily operate defectively at times; that absolute justice and accuracy can not be obtained in exercising the powers of taxation, and will not interfere in equity except where it appears that the lines drawn by the constitution to govern the action have been transcended.

5.—A Court of Equity will not interfere simply to enforce a technical right or an abstract rule of law. The plaintiff must show some wrong or injury. The mere fact that the assessment was apportioned by the foot front in this case, without any allegation that it caused the plaintiff to pay any more than a sum equal to the benefits which he derived from the improvement, states no cause of action.

6.—The front foot rule of apportionment is not necessarily a wrong rule; it may be adopted if in the judgment of the assessing body the benefits were derived in that proportion.

7.—If it appeared in this case that the legislature made inquiry and decided that the benefits were conferred upon each parcel in proportion to its relative frontage, the assessment could not be assailed simply because the frontage rule was used as a detail of the process of distributing and deciding the benefits.

In the absence of any evidence, whether or not the legislature made such prior decision, if such prior decision was necessary to the validity of the assessment, this court will presume that it was made, because all judicial intendments and presumptions are in favor of the regularity and validity of official proceedings.

The Trial Court erred in holding that the mere fact that so much of the amount asssessed upon each parcel was in the same ratio to the entire amount assessed, as the amount of frontage of the parcel on the improvement was to the entire frontage on the improvement, was sufficient evidence that the assessment was not based upon the amount of benefit derived from the improvement by each lot; thus reversing the presumption that the official acts of the legislature and of municipal boards result from correct procedure.

It should be borne in mind that the claim that the assessment is void rests solely upon the allegation that the legislature erroneously directed apportionment according to the frontage, and that no discretion on the subject was vested in the local board, "and that *thereby* and unless the sale thereof be enjoined" the plaintiff's lands will taken without due process of law. (*Fol.* 13, *pp.* 7 & 8.)

There is no allegation of any error or irregularity by the local authorities. Therefore, the single question presented is whether merely because the legislature ordered that the expense be assessed so much upon each lot as was in proportion to its frontage, is the statute unconstitutional and void.

The same question was presented to this Court in *Parsons vs. District of Columbia* (170 U. S., 45), and by the unanious decision of this of this court was answered in the negative.

In that instance Congress had passed an Act directing that assessments levied for laying water mains in the Distrit of Columbia should be at the rate of $1.25 per linear front foot against all lots or land abutting upon the street. The validity of this statute was challenged; the case came to this Court where this objection was disposed of as follows:

"By this legislation a comprehensive system, regulating the "supply of water and the erection and maintenance of reservoirs "and of water mains, was established, and of this legislation "every property owner in the District must be presumed to have "notice. And, accordingly, when by the act of August 11, 1894, "Congress enacted that thereafter assessments levied for laying "water mains in the District of Columbia should be at the rate of "$1.25 per linear front foot against all lots or land abutting upon "the street, road or alley in which a water main shall be laid, such "act must be deemed conclusive alike of the question of the ne"cessity of the work, and *of the benefits as against abutting* "*property*. To open such questions for review by the courts on "the petition of any or every property holder would create end"less confusion. Where the legislature has submitted these ques"tions for inquiry to a commission, or to official persons to be "appointed under municipal ordinances or regulations, the in"quiry becomes in its nature, judicial in such a sense that the

"property owner is entitled to a hearing, or to notice or an op-
"portunity to be heard."

Parsons vs. District of Columbia, 170 U. S., 45.

The Court of Appeals of the State of New York many years ago held the same way. In the opinion from which the following extract is taken there is an examination of the authorities upon the subject, after which the opinion continues:

"The settled principles to be deduced from these cases are, "that the sovereign power of taxation is lodged in the legisla-
"ture; that the power of taxing and the *power of apportioning* "*taxation* are identical and inseparable; that there is no consti-
"tutional restraint upon the exercise of this power; that the "right of determining *what portion* of the public burdens, by "way of taxation, *shall be borne by any individual* or class of "individuals, must be determined by the legislature; that how-
"ever much this power may be abused by the legislature, the only "check upon it is the responsibility of the legislative body to its "constituents."

People ex rel. Crowell et al. v. Lawrence et al. 41 N. Y., *p.* 141.

A local assessment had been adjudged void. The legislature thereupon passed an Act re-assessing the expense. The effect of the Act is stated by the Court of Appeals of New York as follows:

"The act then provides that two-thirds of the cost and ex-
"penses of such improvements is made a lien and assessment "upon the land and premises included in the respective districts of "assessments, 'and two-thirds and no more of each of said several "assessments * * * is *hereby levied* on the several pieces of land "and premises within said several and respective districts, *and in* "*the same proportions in which the same has been already as-*
"*sessed and apportioned therein as aforesaid, levied as a tax* to "be collected and applied by said city; and also provides that "one-third of such expenses shall be a general charge upon the "city.' There are other provisions which it is unnecessary to "notice."

It will be seen that the statute fixed the proportions in which the expense of the improvement should be assessed upon the different parcels of land by reference to the former assessment.

The Court held that the legislature had the capacity to exercise this power, the following being the language of the Court:

"The legislature, in effect, has declared that the petitioner "shall pay a specified sum upon his property, described, toward "defraying the expenses of repaving St. Felix street, adjacent "to which his property is located; and it has imposed a like bur-
"den upon property similarly situated. It was conceded, on the "argument, that the legislature might have authorized a reas-
"sessment. If so, it is clear that it could make the reassessment "itself; and this is precisely what it did by the act of 1872. What-
"ever the legislature may authorize to be done by a municipal

"corporation, it may do itself directly; and it is no objection "that the improvement had been made and expenses incurred. "(37 N. Y., 267)."

Matter of Application of Van Antwerp, Jr., et al Executors, etc., to Vacate Assessment, 56 N. Y., 261.

The *Van Antwerp* case is quoted with approval by this Court in *Spencer vs. Merchant* (125 U. S., 353).

It is respectfully submitted that the following allegations of the answer filled in this case are sustained by the above decisions:

"They allege and aver upon their information and belief that "that rule of apportionment was adopted and authorized by the "legislature of the State of New York with reference to, after in- "quiry into, and upon consideration and determination of the "benefits which the improvement authorized and made conferred "upon the said lands, which inquiry, consideration, and deter- "mination appears by the statutes aforesaid and by each of them, "and that the legislature of the State of New York, under the con- "stitution of that State, as frequently interpreted by its highest "courts, had and now has the power and capacity to prescribe "such rule for apportioning expense of local improvement as will "in its judgment best result in apportioning to each parcel of land "assessed that part of the expense which shall be in proportion "to the benefit conferred by the improvement.

"And further allege and aver that said determination made "by the legislature and evidenced by the said statutes and by each "of them bars and precludes the complainant from asserting or "claiming that said assessment is not made upon the complain- "ant's lands in proportion to the benefits which they derived by "the making of said improvement; and they crave leave to sub- "mit the said statutes and each and every part of them to this "honorable court, that the same may be properly construed in "that regard." (*Fol. 47*).

It has been held by the highest courts of New York that where the legislature delegated to municipal officers the power to apportion the expense of improvement upon parcels of land according to the benefit to each, that the mere fact that it was apportioned according to the frontages did not prove that the amount was not levied in proportion to benefits derived from the improvement.

"The value, the superficial area or the frontage of property "benefited by a local improvement may be adopted as a basis or "method of calculating and ascertaining what part of the cost of "such improvement should be levied upon the several pieces of "property, but neither method will satisfy the requirements of "the statute unless the amount so *levied is in proportion to the "benefits.*" * * * *The presumption of law*, however, is that "the board of assessors proceeded according to law, and that the "assessment was levied according to law, and that the assess- "ment was levied in a fair, just and equitable manner."

D. & H. Canal Co. v. City of Buffalo, 39 App. Div. 346.

In another case, plaintiff objected to the assessment "that it "was apportioned among the owners of the lots fronting upon "the avenue in proportion to the frontage of each lot upon the "street, some of the lots being vacant and others occupied by "valuable buildings."

O'Reilly vs. City of Kingston, 144 N. Y., 447.

There was no evidence in the case, so far as the opinion discloses, of any formal determination by the assessors as to the proportion of benefits, except such as the method of computation and apportionment, which the assessors had adopted, afforded. Of this, Judge Haight, writing the opinion of the court. Court of Appeals of New York, said:

"That the assessors had an opportunity to examine the "premises personally, and were thus possessed of information "which cannot be brought before a court on review, consequently "their judgment upon the question, as to the amount of benefit "derived, cannot be here reviewed, unless they acted upon an "erroneous principle in making the assessment. It appears that "they reached the conclusion that the tax should be apportioned "among the owners of the real estate bordering upon the street "according to the number of feet front owned by each individual. "*This is not necessarily an erroneous principle*, if it was their judg- "ment that each owner *was benefited in that proportion*. On "the other hand, it may be the most just and equitable of any "that could be adopted." (Page 448.)

These decisions defining the power of the legislature and sustaining the method of assessment affect property rights and values. They have been so long recognized in our state that to change them now would disturb titles, change values and disappoint the expectations of those who acted in reliance upon them. And,

"Since the ordinary administration of the law is carried on by "the State courts it necessarily happens that by the course of "their decisions certain rules are established which become rules "of property and action in the State, *and have all the effect of "law, and which it would be wrong to disturb.* This is espec- "ially true with regard to the law of real estate, and the con- "struction of State constitutions and statutes. Such established "rules are always regarded by the Federal courts, no less than by "the State courts themselves, as authoritative declarations of what the law is."

Burges v. Seligman, 107 U. S. 20.

If the statute recited, or if it otherwise appeared affirmatively, that the legislature, by a special committee or otherwise, examined the premises and concluded that each parcel of land fronting upon the street was benefited by the improvement in an amount which bore the same ratio to the entire amount that its frontage bore to the entire frontage and prescribed this rule of

apportionment based on this prior decision, there could be no doubt as to the validity of the assessment.

There is no evidence in this case showing whether or not this was done.

If such prior investigation and decision was necessary we are left by the allegations of the bill to conjecture or presumption as to whether such prior action was or was not taken.

If such prior decision was necessary the Court will not presume that it was not taken but will presume that it was taken.

Because "the general rule is, that acts with purport to have "been done by public officers, in their official capacity, and with- "in the scope of their duty, will be presumed to have been regular "and in accordance with their authority, until the contrary appears."

Abb. Nat. Dig., vol. 2, title Evidence, § 63 (citing cases).

"Every presumption is in favor of the validity of the assessment."

In re Brady, 85 N. Y. 268.

"In an action to restrain the sale of land for nonpayment of an "assessment for a local improvement and to set aside the assessment because of alleged invalidity in the proceedings, *the burden "is upon the plaintiff to establish the invalidity complained of.* "There is no presumption in such an action that municipal aut- "horities have acted illegally or that conditions procedent have "not been performed."

Tingue vs. Village of Port Chester, 101 N. Y. 294.

"Acts done by a corporation, which presuppose the existence "of other acts to make them legally operative, are presumptive "proofs of the lather." (citing cases).

Demings vs. Supreme Lodge, 131 N. Y., 527.

":In the absence of proof to the contrary it will be presumed "that public officers are in the rightful performance of duty."

Valley Township vs. King I. B. Mfg. Co. (Ct. of App. of Kan.), 45 Pac. Rep. 660.

In a similar case to ours the Supreme Court of New Jersey held:

"There is no evidence that in laying the benefits, so far as "there were benefits, upon the frontage, the commissioners did not "conform to the principle of peculiar benefits. The principle of "frontage assessment is not necessarily wrong. If that mode "properly distributes the benefits among the owners of the pro- "perty benefited, there can be no objection to its use."

Raymond's Estate v. Mayor, etc., 27 Atl. Rep. 175.

"Acts done which presuppose the existence of other acts to "make them legally operative are presumptive proof of the "latter."

Scovern v. State of Ohio, 6 Ohio St. 293.

If it be true that the validity of a frontage assessment depends upon a prior determination that the lands were benefited on that

basis the fact that the assessments were made on that basis it presumptive evidence that the determination preceded it.

"All acts done by what appears to be public authority are "presumed to be rightly done, until the contrary is proved."

Commonwealth v. Kane, 108 Mass. 425.

Citing U. S. v. Dandridge, 12 Wheat, 69, 70.

Where the validity of a judgment was involved our own Court of Appeals held:

"But, we think, the principle applies, stated by Story, J., in "The Bank of the U. S. v. Dandridge, 12 Wheat 79, that acts done "by a corporation, which presuppose the existence of other acts "to make them legally operative, are presumptive proofs of the "latter, and that upon this principle it must be presumed, in the "absence of evidence, that the company complied with the act."

Pringle v. Woolworth, 90 N. Y. 510.

"Neither is it essential that the act of the legislature, or an "ordinance made under its authority, should *expressly state that "the contemplated improvement is necessary* (Roads & Streets, "385), nor is it required the act should *expressly declare that "the assessments are made according to the benefits conferred.* "Both of these are implied from the very nature of this species of "taxation, and that this is so is apparent from the action of the "court in upholding such assessments under acts which make no "reference to such particulars."

Raleigh v. Peace, 110 N. C. (Sup. Ct.) 40-41.

When an official body were required to vote on a proposition by ayes and noes and the evidence did not disclose how the votes were taken the court presumed that they were taken by ayes and noes.

In re Board of Rapid Transit (N. Y. First Dept., Gen. Term), 18 N. Y. Sup. 320.

When an act might lawfully have been done by a public body before a given date, and if done subsequently the act would have been without authority, in the absence of evidence the court presumed that the act was in proper time.

State vs. Hannibal, etc. (Sup. Ct. of Mo.), 21 S. W. Rep. 14.

"In the absence of evidence to the contrary it must be pre- "sumed that the cost of reconstructing a sidewalk was appor- "tioned in accordance with the law."

Anderson vs. Bitzer, (Ct. of App. of Ky.), 49 S. W. Rep. 442.

"The court applies the maxim *omnia rite acta*, and assumes "(in the absence of evidence to the contrary) that municipal "authorities have proceeded in accordance with law in imposing "special taxes for a street improvement."

Asphalt Paving Co. vs. Ullman (Sup. Ct. of Mo.), 137 Mo. 544.

"Since the directors are forbidden to employ a teacher not

"legally qualified, in the absence of anything appearing to the "contrary, the courts will indulge in the presumption that the "directors did their duty and that the teacher was legally "qualified."

McShane vs. School Dist., 70 Mo. App. 624.

"We must presume, therefore, until the contrary is shown, "that their action was lawful. It cannot be presumed, as said in "Cummins vs. City of Seymour, 79 Ind. 491, 'that the corporate "officers will violate the law and perpetrate a wrong. The pre-"sumption is the reverse. Until the contrary appears, the "officers of a public corporation are presumed to have done their "duty.'"

Town of Woodruff Place vs. Raschig, 147 Ind. 521.

"We have heretofore referred to the presumption that public "officers do their duty while acting officially; that is, the pre-"sumption operates in favor of the regularity and validity of "official acts." * * * "They are not presumed to disregard "the law or to exercise their power and authority in opposition "to it, to act officially and and in a different mode from that pre-"scribed."

Gillett-Herzog Mfg. Co. vs. Board of Commissioners (Sup. Ct. of Minn.), 72 N. W. Rep. 126.

"When the act upon which his right to maintain an action "depends is an official act, to be performed by a public officer in "the line of his official duty, there is no presumption that any "delay in this performance was unreasonable."

47 Pac. Rep. 879 (Sup. Ct. of Cal.)

In construing statutes which are susceptible of two constructions, the rule announced by the Supreme Court of the United States is:

"Our duty, therefore, is to adopt that construction which, "without doing voilence to the fair meaning of the words used, "brings the statute into harmony with the provisions of the "Constitution."

Grenada Co. vs. Brown, 112 U. S. 261.

It is only when public action is on its face illegal and not susceptible of being regarded as properly taken that the courts will pronounce it illegal.

Soon Hing vs. Crowley, 113 U. S. 703.

The two rules for which I contend, I respectfully submit, are sustained by an abundance of authority uninterrupted for many years, and recognized and applied in the courts of the United States and in nearly all the States, viz.:

(1) *That by the foot front may be adopted by public bodies in apportioning assessments, providing they believe this method accords with the benefits.*

(2) *That in the absence of evidence to the contrary, it will be presumed to have been properly adopted.*

In *Norwood vs Baker*, so much relied upon by the plaintiff,

and on the authority of which this case was decided in the court below, *it appeared on the face of the proceedings* that the officers had not acted within the scope of their powers under the constitution; their power to make local assessments was limited to cases in which the improvement had conferred local benefits, and to the just apportionment of the burden in accordance with the benefits in that locality.

The *record showed* that all consideration of benefits was deliberately excluded; that the local body by affirmative action had decided to lay all considerations of benefits aside and to assess the expense arbitrarily without regard of benefits.

The Ohio statute, section 2264, authorized the local council to assess the expense of a local improvement:

"On the abutting and such adjacent and contiguous or other "other benefited lots and lands in the corporation *either* in pro- "portion to the benefits which may result from the improvement, "*or* according to the value of the property assessed, or by the front foot of the bounding and abutting the improvement."

Concerning this statute, the Supreme Court of Ohio, in City of *Cincinnati vs Batsche*, 40 N. E. Rep., 23, spoke of the "frontage plan" as "one of the methods of assessment designated in the Revised Statutes," and again the methods are referred to in this case as "three statutory 'modes' of apportioning by special assessment the costs and expenses of the improvement upon the lots of land."

The court then gives the history of the development of these different "modes" in the statutes of Ohio and concludes:

"A plan of assessment in proportion to resulting benefits, dis- "tinct from that according to valuations and that by the foot "front, is therefore, provided by statute, which is not limited to "lots and lands bounding and abutting upon the improvement, "but may be extended to lots and lands contiguous and adjacent, "though situated on streets other than that of the improvement."

In that case the court holds that where the council elects to proceed under one of these distinct plans of "assessment" the proceedings must be conducted in conformity to it and cannot be conducted in a mixed method comprising features of the different plans.

So, that under the construction which the highest court in the State of Ohio had placed upon this statute and, indeed, according to its obvious meaning, the adoption of the foot-front mode of apportionment necessarily excluded the methods of apportionment on the basis of benefits and on the basis of valuation. The case was precisely as if the legislature of Ohio had passed a statute which directed the local council to exclude all considerations of benefit and all consideration of the valuations of the different parcels, and to apportion the expense on the basis of frontages, without reference to any other consideration whatever.

Had the legislature simply passed an act directing that the apportionment be made by the foot front, or in the method prescribed by our statute of 1893, this Court would have undoubtedly upheld it because it would have held, as it frequently has, that the enactment of the statute in that form by the legislature was a determination that these lots and parcels of land would be benefited in proportion to their relative frontage upon the improvement. See cases cited in the opinion of Mr. Justice Brewer, 172 U. S., 297.

There was no opportunity to indulge in presumptions that the proceedings were properly conducted, because it affirmatively appeared that they had not been; that the only theory on which under the constitution, the expense of a public improvement could be assessed locally, had been sit aside.

A brief reference to the prevailing opinion in *Norwood* case will sustain the above statement.

This court, in the prevailing opinion (172 U. S., at *p.* 281), quotes with approval from a Missouri case as follows, viz:

"The whole theory of local taxation or assessment is that "the improvements for which they are levied afford a remunera-"tion in the way of benefits. A law which would attempt to "make one person, or a given number of persons, under the guise "of local assessments, pay a general revenue for the public at "large, would not be an exercise of the taxing power, but an act "of confiscation."

At pages 289 and 290 the prevailing opinion recites the provisions of the statues under which the improvement was made, and adds:

"*It thus appears* that the statute authorizes a special assess-"ment upon abounding and abutting property by the front foot "for the entire cost and expense of the improvements *without tak-"ing special benefits into account.* And that was the method "pursued by the village of Norwood."

This is a much different decision from the decision which was made by the trial court in our case.

In the Norwood case the proceedings bore evidence on their face, "it *thus appeared,*" that all consideration of benefits was excluded and the expense arbitrarily apportioned according to frontage.

In our case there is no evidence on the face of the proceedings; there is no allegation in the complaint; there is no proof before the court of any kind that the assessment was not apportioned according to benefits. The plaintiff and the court below *infer* that the mere fact that the apportionment was made by the foot front, affords evidence that all consideration of benefits were excluded.

I respectfully submit that the plaintiff and the lower court are in error. That in the words of Justice McLennan, in giving the opinion of the Appellate Division of the Supreme Court of the State of New York, "the frontage of property benefitted by local

"improvement may be adopted as a basis or method of calcula-
"ing, and ascertaining what part of the cost of such improve-
"ment should be levied upon the several pieces of property,"
providing the amount so levied is in proportion to the benefits and that in the absence of evidence to the contrary "*the presump-*
"*tion of law*, however, is that the board of assessors proceeded
"according to law," and that the assessment was levied in proportion to the benefits.

Delaware & Hudson Canal Co. vs. Buffalo, 39 App. Div., 346.

Or in the language in which the judgment of the Court of Appeals is expressed by Mr. Judge Haight that the apportionment by the foot front "is not necessarily an erroneous principle,
"if it was there" (assessors or legislators) "judgment that each
"owner was benefited in that proportion."

O'Reilley vs. City of Kingston, 114 N. Y., p. 448.

Or as was said by the Supreme Court in New Jersey, "there is
"no evidence that in laying the benefits so far as there were bene-
"fits, upon the frontage, the commissioners did not conform to
"the principle of peculiar benefits. *The principle of frontage*
"*assessment is not necessarily wrong.* If that mode properly
"distributes the benefits among the owners of the property bene-
"fited, there can be no objection to its use."

Redmonds estate vs. Mayor, etc., 27 Atl. Rep. 175, and see the numerous authorities on this subject hereinbefore cited.

As I have already endeavored to show, the allegations of the bill, that the parcels "were not benefitted equally by the making of said improvement * * * that many of said lots and parcels are unequal in size and depth and of unequal value" (folio 13) does not show facts from which it may be inferred that a frontage assessment did not distribute the burthen according to the benefit since size and value are measured by frontage, and depth beyond a short distance from the street would not be benefited by the improvement.

It can not be claimed in this case that the statute is void because there was no notice to the property owners ~~*or board*~~ and opportunity *to be heard before the rule for apportioning the benefits on the several parcels of land was adopted by the legislature.*

It is not necessary that every property owner to be affected by a tax statute have notice and opportunity to be heard before the legislature establishes a rule of apportionment. It is sufficient if at any stage of the proceeding he have notice and an opportunity to object.

Spencer vs. Merchant, 100 N. Y., 585.

Spencer vs. Merchant, 125 U. S., 345.

The original statute (Chap. 550, Laws of 1893) which authorized this work to be done, directed that the expense be apportioned in the manner in which it was apportioned under the subsequent statute, (Chap. 816, Laws of 1895), so that from

the very first the property owners knew it was contemplated to make the improvement at the expense of the lots or parcels of land fronting upon the improvement, and to be distributed according to the relative frontages of these parcels. And the first section of the Act of 1893 directed the Town Board to make a preliminary order describing the contemplated improvement, estimating the expense to be levied, and directed that "a copy of "said order shall be published once a week for two weeks in a "newspaper printed in the Village of Tonawanda. Said order "shall also contain a notice notifying all persons interested in "said improvement to appear before said board at a time and "place to be specified therein, which shall not be less than ten "days after the first publication thereof, to make such objections "as they may have *to such improvement*, which order and notices "in addition to being published as aforesaid, shall be posted con-"spicuously in at least three public places in said town, not less "than ten day prior to the date to be specified therein for the "hearing of objections as aforesaid. The said order and notice "shall be signed by the chairman of the town board of said town.

"§2. At the time and place to be specified in the notice "mentioned in the last preceding section, or at such time and "place as the said town board shall adjourn to from time to time, "it shall give all persons appearing to object *to said improve-"ment*, or to be heard in reference thereto, a reasonable hearing "and thereupon may reverse, affirm or modify the said order as "the said board may deem proper.,,

If the scheme of apportionment outlined in the statute would operate unjustly or inequitably this objection could have been urged to the board against the improvement; if it was violative of the constitution and would operate to distribute the burden of the improvement in amounts in excess of the benefits to the respective parcels, this objection could have been urged to the board; and if the objection was meritorious, and if the board should err in judgment and determine to make the improvement pursuant to the scheme outlined in the statute when it was inequitable or unjust to do so, under the laws of procedure of the State of New York (Chap. 16, Title 2, Art. 7., Code of Civil Pro.), the matter could have been taken to the Supreme Court by certiorari.

The first section of this article reads as follows:

"Section 2120. Cases where writ may issue. The writ of "certiarari regulated in this article, except the writ specified in "section 2124 of this act, is issued to review the determination "of a body or officer. It can be issued in one of the following "cases only." * * *

"2. Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ or the power of the court to issue it is not expressly taken away by statute."

Section 2124 above referred to has reference to the use of the writ from one court to another.

That this remedy is available in a case of this kind has been decided by the highest court of the State of New York.

Kennedy vs. City of Troy, 77 N. Y., 493.

People ex rel Spencer vs. New Rochelle, 83 Hun, 185.

The subsequent statpte under which the assessment was made (Chapter 816, Laws of 1895, Section 44) provided for notice when the assessment-roll should be completed, of a time and place when "the board shall meet and hear and consider "any objections to the assessment-roll, and may change or "amend the same if they deem it necessary or just to do so, and "may affirm and adopt the same as originally proposed, or as "amended or changed, or they may annul the same and order the "engineer and surveyor to proceed anew and prepare another "list."

And further provided that if it should be annulled and new list made, like notice and hearing should be given and like power for its review. And section 46 of the statute provided:

That "any person interested who shall have appeared before "the board and made his objections at any hearing provided for "in this statute, and who shall consider himself aggrieved by the "action of the board, may, within twenty days thereafter, have "a writ of certiorari for a review of the decision or action of the "board from the Supreme Court, pursuant to the general pro-"cedure in that court."

And the court was given power to review or revise or annul the action of the board.

It will be seen that at the inception of the proceedings and during their progress the rights of the parties interested to a hearing and redress of grievances was carefully guarded.

Should it be held that a statute which arbitrarily fixes the rule by which a public burden shall be apportioned without giving the taxpayer an opportunity to be heard, and to show that he will not be benefited, in accordance to this rule, by the public expenditure, is unconstitutional and void, it would unsettle titles and rights on which the public have reposed since the foundations of our government.

If there must be this notice, hearing and determination as to benefits in each instance of local taxation, there must be the same as to general taxation, because, as the law is in New York, *all taxes are imposed on the same theory, viz.: that the purposes for which they are to be applied will afford equivalent compensition in benefit to the person who pays them.*

"Money is property. Taxation takes it for public use; and "the taxpayer receives, or is supposed to receive his just compen-"sation in the protection which government affords to his life, "liberty and property, and in the increase of the value of his pos-"sessions by the use to which the government applies the money

"raised by the tax." * * * "*The difference between general taxa-*
"*tion and special assessments for local objects, requires that they*
"*should be distinguished by different names, although both de-*
"*rive their authority from the taxing power.*"

The People vs. Mayor, etc., of Brooklyn, 4 N. Y., 419.

If the owner must in every instance be given notice and a and a hearing, and there must be a decision whether the amount of his tax is in proportion to his benefit, there can be no general rule of apportionment. There *must be a special decision in each case*, and if the legislature may not make the decision, where does the power to decide that the assessment is greater than the benefits reside? Must the courts decide that question in every instance? If so, every tax will be laid with uncertainty because no one will know whether the courts will concur in the judgment of the legislature that a public work will improve a specified territory only, and that this territory only should be taxed for it, or that it benefits each parcel of land within this territory in proportion to its superficial area, or to its value, or to its relation to the improvement, or in any other proportion which the legislature may believe to be just and prescribe. In other words, is every conclusion of fact which it may become necessary for the legislature to form in prescribing a scheme of taxation, or of local improvement, to be reviewed by the courts?

Must there be a judgment in the case of each individual as to how much the proposed tax will benefit him? If it be a tax to maintain the National Guard, will the citizens of cities and centers of industries where outbreaks are most liable to occur, be benefited more than the isolated farmers? And if the legislature prescribes a uniform rate of taxation, based on the value of their property respectively, will the courts set the legislation aside as contrary to the Constitution, upon the ground that it will be unjust to assess them arbitrarily in proportion to the valuation of their property, witout giving them an opportunity to be heard before a tax is apportioned, on the basis of valuation, before some tribunal having capacity to decide how much each will be benefited by the maintenance of the National Guard, and how much of the burden of its expense each must bear?

If it be a tax to defray the expense of administering justice, should not those who are so unfortunate as to have lawsuits pay more than those who do not? Is the benefit to each by the administration of justice the same, and is not the statute apportioning this expense arbitrarily and in proportion to the valuation of the property of each, without regard to the benefits, and without providing for a hearing before some body which shall have power to say how much each will be benefited by the administration of justice, and to adjust the amount that each will pay in proportion to such benefit, unconstitutional?

This will be the logical result of giving the *Village of Norwood* case the effect which our opponents contend for, and it would

lead to great uncertainty and confusion because, as in this case, the court might not be called upon to act in each case until long after improvements have been made, taxation laid and obligations assumed and parties have expended their money and their toil on the faith of the statute.

I don't believe that the case of the *Village of Norwood* goes to that extent. It justifies no such claim. It merely decides what has always been the law, that where a statute *on its face* clearly contravenes the provisions of the Constitution, it is the province of the courts to declare it invalid and refuse to carry it into effect. But when the legislature has acted on a subject that is within its jurisdiction and in a way which on any construction of its action it may be found consistent with its authority, such construction will be given it, and that all presumptions are in favor of its validity.

I respectfully submit that this Court has not decided that a statute directing that taxes be paid on the basis of the value of one's property, of the amount of one's income, or the amount of the output of a distillery, and so on, leaving only the question of value or amount to be settled on a hearing, are unconstitutional and void. If the legislature may decide that one is benefited by the improvement of all the highways in the town in proportion to the value of his property without notice to him, may it not, also, decide that one is benefited by the improvement of one of these highways in proportion to the frontage of his land upon it without such notice?

The Legislature being vested with all the power necessary to enable it to make a valid assessment, and there being no allegation in the complaint that the property of the plaintiff was not benefitted by the improvement or that the amount apportioned to his property was in excess of the amount of his benefits, or that he was in any manner dealt unjustly by, Equity will not set the proceedings aside simply because the assessment was made by the frontage, even if technically this was improper. Equity looks to the effect rather than to the form.

To use the language of Mr. Justice Brown in giving the judgement of this court. "A court of Equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice."

Foster vs. Mansfield, 146 U. S., 88.

"Until *injury* is shown, the error is technical and not substantial."

In re Petition of Mutual Life Ins Co., 89 N. Y., 530.

Bell vs. City of Yonkers, 78 Hun, 202.

"The objection by a lot owner that a method of apportion-
"ment of assessment was adopted on the erroneous assumption
"that the property was divided into squares by principal streets
"cannot be sustained where it does not appear that he would
"have had to pay less if a different method had been adopted."

McHenry vs. Selvage (Ct. of App. of Ky.), 35 S. W. Rep., 615.

"This court is not the hardor in which people of a city or "county can find a refuge from ill-advised, unequal, and oppres- "sive State legislation."

Walston vs. Nevin, 128 U. S. 578.

See, also, Hoffeld vs. Buffalo 130 N. Y. 387.

It will not do to set aside the proceedings of a public body which in its results works justly, simply because it has not been taken in literal compliance with law.

Even at law "it would be contrary to the general rule to re- "verse a judgment for a technical error which did not affect the "result."

Matter of Bernsee, 141 N. Y. 394.

Not only is there no allegation that the plaintiff was injured by the alleged error but there is good authority for contending that the method is equitable.

The following from one of JUDGE SHARSWOOD'S opinions is also quoted with approval by the Supreme Court of North Carolina:

"Perhaps no fairer rule can be adopted than the proportion "of feet front, although there must be some inequalities of the "lots differing in situation and depth. Appraising their market "values and fixing the proportions according to these, is a *plan* "*open to favoritism or corruption, and other objections.*"

The following, from Elliott on Roads and Streets (page 396), is also quoted with approval:

"The system which leads to the least mischievious and unjust "consequences is that which takes into account the entire line of "the way improved and apportions the expense according to the "frontage, for it takes into consideration the benefit to each "property-owner that accrues from the improvement of the entire "line of the way and does not impose upon one lot owner an "unjust portion of the burden."

Raleigh v. Peace, 110 N. C. 42, 43.

The Supreme Court of Delaware fully recognizing the principle laid down in the *Norwood* case that it is only the special benefits actually or presumptively received from the improvement which justifies the local assessment says:

"When the legislature adopts the latter method (*i. e.*, the "measurement of length, quantity or value), *it decides itself the* "*proportion in which the estates respectively will be benefited;* "as when it determines that the frontage or area of abutting lots, "or both combined, shall constitute the measure of a sewer as- "sessment. If the legislature has exercised its power *bona fide* it "must necessarily have considered all the circumstances surround- "the particular case and have decided that all things considered "such a measure would prove as nearly just and equal in its "actual operation as any practicable method could be."

In considering an objection to the foot-front rule of apportionment where, as it is claimed in this case, some of the lots were deeper than others, the Supreme Court of Connecticut overruled the objection as follows:

"When we consider that here is land that would be benefited "to an amount of more than $3,600 by the laying out of this "street, should the annexation be made, and the land adjoining "would likewise be benefited to a large amount under like circum- "stances, and that no benefit would be conferred upon either "tract so long as they remained the property of different propri- "etors, is it reasonable to suppose that there can be any serious "obstacle to prevent the one owner from selling and the other "from buying, when so great an advantage would result to both "from such sale and purchase? A consideration of this character "no doubt had its proper effect in the determination of the question "whether the land was benefited or not, and the extent of that "benefit."

Terry v. Hartford, 39, Conn. 286.

In conclusion it is respectfully submitted that the decree appealed from should be reversed with costs to the appellants in this court and the cause remanded with directions to dismiss the suit with costs in the court below.

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